Supreme Court, U.S.
FILED
OCT - 8 2002
OFFICE OF THE CLERK

(1)

No. 02 573

In the

Supreme Court of the United States

DARRYL WRIGHT,

Petitioner,

v.

JEANNE WOODFORD, Warden, San Quentin State Prison, and PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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28 pp

QUESTIONS PRESENTED FOR REVIEW

1. Did the Ninth Circuit err in ruling that petitioner's claimed newly discovered evidence was not "newly discovered" within the time frame of 28 U.S.C. §2244(d)(1)(D) when petitioner's allegation that the evidence could not have been presented at trial with due diligence was never contradicted?

2. Did the Ninth Circuit err in ascribing a different meaning to the language in 28 U.S.C. §2244(d)(1)(D) that permits a federal habeas corpus petition to be filed within one year of "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence" than the established meaning of "newly discovered evidence" to mean evidence that could not have been presented at trial with due diligence?

3. Did the Ninth Circuit err in ruling that the district court's certificate of appealability on the issue of timeliness did not include the issue of whether the district court should have held an evidentiary hearing to determine whether petitioner exercised diligence in obtaining the testimony of the witnesses claimed to be newly discovered, when "diligence" is an operative term in 28 U.S.C. §2244(d)(1)(D) and the district court's certificate did not contain limiting language restricting the Ninth Circuit's consideration of the timeliness issue?

4. Did the Ninth Circuit err or deny petitioner due process of law in ruling that the certificate of appealability restricted its consideration of whether the district court should have held an evidentiary hearing without giving petitioner an opportunity to be heard on the issue?

5. Should the Ninth Circuit have remanded for an evidentiary hearing on the issue of whether petitioner had exercised due diligence in discovering his claimed newly discovered evidence?

LIST OF ALL PARTIES

Petitioner

Darryl Wright, an individual.

Respondents

JEANNE WOODFORD, Warden, San Quentin State Prison.
PEOPLE OF THE STATE OF CALIFORNIA.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Darryl Wright respectfully petitions for a writ of certiorari, to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered April 16, 2002, rehearing denied on July 18, 2002.

CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES.

The orders are unpublished. A copy of the orders of the Ninth Circuit and district court are attached as an appendix.

BASIS FOR JURISDICTION IN THE SUPREME COURT

1. Date of entry of order sought to be reviewed: April 16, 2002.
2. Date of any order respecting rehearing: July 18, 2002.
3. Statutory provision believed to confer on this Court jurisdiction to review on a writ of certiorari the judgment or order in question: 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Article I, Section 9. The Privilege of the Writ of *habeas corpus* shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it.

Fifth Amendment. No person shall be ... deprived of life, liberty, or property, without due process of law...

Fourteenth Amendment. Section. 1. ..... No State shall ... deprive any person of life, liberty, or property, without due process of law...

United States Code

28 U.S.C. section 2244(d)(1)(D). A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of ...the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. section 2244(d)(2). The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE, INCLUDING BASIS OF JURISDICTION IN FEDERAL COURT

1. Basis of jurisdiction in federal court

The basis for jurisdiction in the federal court in the first instance was 28 U.S.C. section 2254.

2. Statement of the Case

a. Introduction.

The underlying petition for writ of habeas corpus arose out of a state court collateral relief petition challenging his September 22, 1981 conviction for first degree murder. Petitioner is presently serving a sentence of 25 to life for the shooting.

The shooting occurred on November 22, 1980, at about 4:30

A.M. on the street outside the "Fugitive Club", a bar and pool hall in Richmond, California. Petitioner was at the Fugitive Club when the shooting occurred. Various witnesses placed him either inside the Club or outside on the street, shooting the victim.

Petitioner based his state collateral relief proceeding on the testimony of four newly discovered witnesses: James Barnett, Mitchell Minor, James Turner, and Alverster Neal. Three of these individuals submitted declarations that petitioner had been inside the Club when the shooting occurred. The fourth witness, Neal, provided information relevant to petitioner's claim that his attorney had ineffectively assisted him.

In his state collateral relief proceeding, petitioner submitted a declaration stating that he had asked his public defender to call four witnesses at trial whom he believed would testify that he was inside the Club at the time of the shooting: Willie Featherstone, Michael Emerson, Mitchell Minor and James Barnett. The public defender called Featherstone and Emerson, (who testified that petitioner had been inside the Club when the shooting occur), but failed to call Minor and Barnett. Petitioner argued alternatively that, either the witnesses were newly discovered, or, (in the case of Minor and Barnett) if they could have been produced at the trial through the exercise of due diligence, the failure of trial counsel to subpoena them was ineffective assistance of counsel. However, petitioner also presented evidence, through the witnesses' declarations, that they could not have been produced at trial with due diligence.

Both Turner and Barnett declared that they had actively avoided becoming witnesses in the trial; Turner, because he was a church elder and would have been embarrassed if the members of the church learned that he had been in a bar at 4:30 in the morning, and Barnett, because he had received death threats from relatives of the victim.

Miner had been interviewed by a police detective early in the investigation before petitioner was charged with the killing. The detective had asked Miner if he saw who the gunman was. Miner said he did not because he was inside the Club at the time. Thus, the police

reports produced in discovery indicated that Miner had no information about the crime. However, the detective had not asked Miner specifically about petitioner's whereabouts when the shooting occurred. The detective did not reinterview Miner after petitioner had been charged.

However, all of the courts that have reviewed petitioner's case have either denied his petition without comment or have held that the witnesses were not "newly discovered", simply on the basis that petitioner knew of their existence. The courts all ignored Turner, whom the petitioner had not known existed, and ignored the issue of whether petitioner could have produced the witnesses at trial with due diligence. On that basis, both the district court and Ninth Circuit held that petitioner's petition did not fall within the provisions of 28 U.S.C. §2244(d)(1)(D). [1]

b. Summary of the shooting and original trial proceedings.

Ernest Riley was shot and killed on the street outside the Fugitive Club on November 22, 1980, at about 4:30 am. It was closing time for the Club and a crowd of people were walking out of the club when the shooting occurred.

One witness, Adams, accused petitioner of shooting Riley. A second witness, Tillis, testified that petitioner had tried to dispose of a gun after Riley had been shot. A third witness, Kelly, saw Riley being shot, and although he did not recognize the shooter, saw that it was not petitioner. Two other witnesses, Emerson and Featherstone,

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[1] The Ninth Circuit ruled that the certificate of appealability did not include the issue of whether the district court should have held an evidentiary hearing on the question of diligence. The Ninth Circuit read the certificate of appealability too narrowly. This was a part of the newly discovered Diligence is an opperative term in the statute and the district court's certification did not restrict the scope of the Ninth Circuit's consideration of the timeliness issue. evidence certification. See Appendix 2.

placed petitioner inside the Club when the shots were fired.

Witness Adams said he and Riley had gone to various bars in Richmond drinking before going to the Fugitive Club. Adams admitted that on the way to the Fugitive Club, Riley had gotten a pistol from his house. and told Adams that he had "some business" to attend to. Adams initially told the police he had heard two shots fired and then seen petitioner with a gun. At trial, he changed his story and testified that he had heard the first shot, seen petitioner with a gun, and then saw petitioner shoot Riley. Adams' description of the clothes the gunman was wearing, a brown shirt and black pants with no hat, did not match the clothes petitioner was actually wearing that evening.

Witness Tillis testified that he had shared a bottle of brandy with petitioner outside the Fugitive Club earlier that evening. Tillis saw both Riley and petitioner inside the Club that evening. Tillis testified that he had been behind Riley leaving the Club at closing time when he heard shots and saw Riley fall down. He did not see who shot Riley. However, he testified that he saw petitioner walk up to Riley, and when petitioner saw Riley had been shot, he panicked since he apparently was carrying a gun. Tillis said that petitioner tried to give his gun away, then got in his car and left. Tillis admitted that he told the police that he believed Riley was reaching for a gun when he was shot.

Witness Kelly testified that he'd come to the Club with petitioner in petitioner's car and that he had come out of the Club first to warm up the car. While waiting for petitioner, Kelly saw Riley get shot. He saw Petitioner start to come out of the club, go back inside, come out a second time, walk over towards Riley and then go to the car. Kelly and petitioner then left.

Witnesses Emerson and Featherstone both placed petitioner inside the Club when the shooting occurred. Emerson, the bartender-manager of the Club, testified that he saw petitioner inside the Club about a minute before the shots were fired and immediately after the shots were fired. Featherstone, a customer of the Club, said that he had greeted petitioner at a pool table in the Club immediately before

the shots were fired.

No gun or any other physical evidence was found in petitioner's position. The police took gunshot residue samples from petitioner but never analyzed them. The police found a pistol in the dead Riley's waistband in a "cross draw" position with the safety off. The coroner testifed that examination of the gunshot wounds revealed that the gunman had fired the bullets from a distance of more than three feet away. Riley was a big man (260 lbs, 6'5" tall) and when shot, had a blood alcohol content of .12 and traces of codeine, morphine, and amphetamine in his blood stream.

The prosecution's theory of motive was that Riley had tried to shoot petitioner. Riley had been prosecuted, but petitioner had not appeared at the preliminary examination and the case against Riley had apparently been dismissed. Petitioner had later told the prosecutor that he had not seen his assailant; he had been hit by a glancing bullet on the right side of his head, knocked unconscious, and remembered nothing after that.

c. The newly discovered evidence

In the post conviction proceedings, petitioner offered the declarations of three witnesses who had been in the Club at the time of the shooting – -- James Barnett, Mitchell Minor, and James Turner.

Barnett declared that he had been playing pool with Petitioner and that petitioner had not been wearing clothes that could conceal a gun, since, besides a shirt and pants, petitioner was wearing only a short vest and no jacket. Barnett said that, although the murdered man Riley had been inside the club, petitioner had not seemed to be paying any attention to him. He did not see petitioner when the shots were fired, however.

Miner declared that he had seen Petitioner immediately after he heard the shots. Petitioner was inside the Club in the middle of a crowd of people, without any noticeable gun, in a position where it would have been very difficult to shoot from.

Turner declared that he had seen petitioner playing pool in the club and had heard various people warn petitioner not to go outside because they believed Riley, the murdered man, wanted trouble. Turner heard the shots when Petitioner was still in the club, right at the door to the outside.

Petitioner also offered a declaration of a fourth newly discovered witness, Alverster Neal, who said that petitioner's public defender had also been representing Neal at the same time. Knowing Neal was a friend of petitioner's, the public defender had said that he was "pressed for time", that he believed petitioner had shot Riley, and that Neal should advise petitioner to proceed under a self-defense theory. Rosenthal's remarks suggested to Neal that Rosenthal didn't have enough time to prepare Petitioner's case, had already decided that Petitioner had shot Riley, and was thus not spending time finding exculpatory witnesses like Minor and Barnett.

ARGUMENT

a. Newly discovered evidence is evidence that could not have been presented at trial in the exercise of due diligence.

This court has defined newly discovered evidence as evidence that could not have been presented at trial in the exercise of due diligence. See *Townsend v. Sain*, 372 U.S. 293, 313, 83 S.Ct. 745, 757, 9 L.Ed.2d 770 (1963) (evidence "which could not reasonably have been presented to the State Court"). Under *Townsend*, the federal courts must hold an evidentiary hearing on such evidence if no such hearing was held in the state courts. The Ninth Circuit has followed this rule. See, e.g., *Chacon v. Wood* 36 F.3d 1459at 1466 (9th Cir. 1994), *Baumann v. United States* 692 F.2d 565, 580 (9th Cir. 1982).

Petitioner did not know about the witness Turner who placed him inside the Club when the shots were fired at the time of trial. Turner was not merely a newly discovered witness in the sense that his testimony could not have been presented at trial with due diligence,

but was a witness totally unknown to petitioner at the time of trial. The Ninth Circuit, however, ignored Turner's existence, even when it was re-emphasized in a petition for rehearing.

Petitioner told his trial counsel that he believed that witnesses Miner and Barnett would testify that he was inside the Club if subpoenaed to testify. However, Petitioner's mere belief that Miner and Barnett would support his alibi was not evidence that he could have presented, either at trial or to support a *habeas corpus* proceeding. Such a declaration would be evidence of nothing but petitioner's own hopes or mental state. Petitioner would not have had the evidence in presentable form until, at the earliest, the witnesses actually confirmed what he believed in some way and were available to testify. See, e.g., *United States v. Krasny*, 607 F.2d 840 (9th Cir. 1979) (newly discovered evidence arose when government witness partially recanted her trial testimony), *United States v. Endicott*, 869 F.2d 452 (9th Cir. 1989) (government witness tells defense counsel after the trial about promises by government agent to pay him money for favorable testimony), *United States. v. Steel*, 759 F.2d 706 (9th Cir. 1985) (government witness tells FBI agent before trial that defendant had not drawn his knife, testifies at trial that defendant drew his knife, but agent was unavailable at trial and so was unable to catch the falsehood until after defendant was convicted), *See also Bunney v. Mitchell*, 241 F.3d 1151 (9th Cir. 2001), (follow-up opinions at 249 F.3d 1188 and 262 F.3d 973) (defendant's newly discovered evidence that she had suffered from battered women's syndrome, a mental illness, at the time of the offense, was discovered not when the defendant knew she had been battered but from when her psychologist stated or testified that she had been suffering from the syndrome), *United States v. Kenny*, 645 F.2d 1323 (9th Cir. 1980) (Ninth Circuit finds a "close question" of whether evidence was newly discovered where a potential witness, a typist who would have prepared the final version of the technical study whose existence the government disputed told the prosecution and defense before trial that she could not remember the content of what she had typed, and so

was not called by either side. After trial, she signed an affidavit stating that she had examined a draft of the technical study and recognized her handwritten notations on it, indicating that she must have typed some portion of the final copy. Petitioner argued this was newly discovered evidence because it did not exist until the moment the typist recognized her notations on the draft.)

Whether petitioner could have produced the testimony of Turner, Miner, or Barnett at his trial in the exercise of due diligence is another matter, but one that never has been established one way or the other. There is no evidence suggesting that a diligent investigation by petitioner's trial counsel would have even uncovered the unknown witness Turner. Moreover, evidence petitioner presented suggested that both Turner and Barnett were actively avoiding being witnesses for their own reasons, suggesting that neither could have been produced at trial in the exercise of due diligence.

b. The "discovery" of the "factual predicate" language of 28 U.S.C. section 2244(d)(1)(D) of the claim or claims presented has the same meaning as the discould have been discovered through the exercise of due diligence.

Bunney v. Mitchell, discussed above, was a case on timeliness under 28 U.S.C. section 2244(d)(1(D), not merely a newly discovered evidence case. The Ninth Circuit treated the "discovery" of the "factual predicate" language as if it meant the same thing as the date that the evidence could have been presented in the exercise of due diligence.

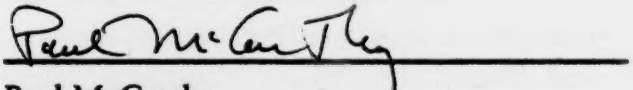
c. The Ninth Circuit erred in limiting the scope of the certificate of appealability.

The district court's order of dismissal and order granting certificate of appealability, attached as appendices 3 and 4, show that the district court dismissed on grounds of timeliness and granted a certificate of

appealability on the timeliness issue. The normal interpretation of the certificate of appealability would be that it covered all of the issues relating to timeliness, including whether the record showed that petitioner had exercised due diligence under 28 U.S.C. section 2244(d)(1)(D) and if not, whether the court should have held an evidentiary hearing on the issue of whether petitioner had exercised due diligence. Given the liberal interpretation given to certificates of ability (see, e.g., *Slack v. McDaniel*, 529 U.S. 473, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (standard is "that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further") the Ninth Circuit erred in restricting the previously granted certificate of appealability. More disturbing is the manner in which the panel limited the certificate, sua sponte as part of its opinion without giving petitioner an opportunity to be heard on the issue. Such a practice would require any appellant in a habeas corpus case to move for a certificate of appealability from the Ninth Circuit, even if the district court had granted a certificate of appealability, if it was a remote possibility that a panel of the Ninth Circuit could read the district court's grant restrictively.

CONCLUSION

For the reasons given above, this court should grant certiorari.
Dated: Oakland, California, Friday, September 27, 2002.



Paul McCarthy
Attorney for *Defendant DARRYL WRIGHT*

APPENDIX 1

FILED
JUL 18 2002
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARRYL WRIGHT

Petitioner - Appellant,

v.

JEANNE WOODFORD
Warden,

Respondent - Appellee.

No. 01-15339
DC# CV-00-02519-PJH
Northern California (San Francisco)

ORDER

Before: BROWNING, KLEINFELD and GOULD, Circuit Judges

The panel has voted to deny appellant's petition for panel rehearing and/or rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petition for panel rehearing and/or rehearing en banc is DENIED.

No further filings shall be accepted in this closed appeal.

APPENDIX 2

FILED
APR 16 2002
CATHY A. CATTERSON
CLERK, U.S. COURT OF APPEALS

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DARRYL WRIGHT *Petitioner - Appellant,* v. JEANNE WOODFORD Warden, *Respondent - Appellee.*	No. 01-15339 DC# CV-00-02519-PJH Northern California (San Francisco) MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Phyllis J. Hamilton, District Judge, Presiding
Submitted April 8, 2002**

Before: BROWNING, KLEINFELD, and GOULD, Circuit Judges.

Darryl Wright, a California state prisoner, appeals the district court's dismissal of his 28 U.S.C. § 2254 petition as untimely under

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

28 U.S.C. § 2244(d)(1)(A). We have jurisdiction pursuant to 28 U.S.C. § 2253. We review de novo the district court's dismissal of Wright's habeas petition, we review the district court's findings of fact for clear error, and we affirm. See Miles v. Prunty, 187 F.3d 1104, 1105 (9th Cir. 1999).

Wright contends that his § 2254 petition was filed within the Antiterrorism and Effective Death Penalty Act's (AEDPA) one-year limitation period based on the date he diligently acquired newly discovered evidence.[2] See 28 U.S.C. §2244(d)(1)(D) (the one-year time limit begins running on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence"). The district court properly determined that § 2244(d)(1)(D) did not apply because the record reflects that Wright knew about the "new" evidence at the time of trial. See *Hasan v. Galaza*, 254 F.3d 1150, 1154 n.3 (9th Cir. 200 1) (stating the statute of limitations begins to run when the prisoner knows the important facts, not when the prisoner recognizes their legal significance). Accordingly, the district court's holding that § 2244(d)(1)(A) barred Wright's petition was correct. See Jiminez v. Rice, 276 F.3d 478, 482 (9th. Cir. 200 1) (stating that filing of state habeas petition after AEDPA's one-year time period has elapsed bars federal habeas review).

AFFIRMED.

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[2] On January 29, 200 1, the district court issued a certificate of appealability on the issue of whether newly discovered evidence extended the statute of limitations period making Wright's petition timely. To date, Wright has not filed a motion under 9th Cir. R. 22-1 (d) for broader certification to include several issues contained in his appellate brief: whether the district court is required to hold an evidentiary hearing to resolve his § 2254 motion, whether the district court erred by dismissing the petition based solely on a motion to dismiss, and whether the district court erred by relying on the documents submitted by the state with its motion to dismiss. The time for such a motion has expired, accordingly, we will not consider these contentions. See 9th Cir. R. 22-1(d); Hiivala v. Wood, 195 F.3d 1098, 1103 (9th Cir. 1999) (per curiam).

APPENDIX 3

FILED
JAN 29 2000
RICHARD W. WEIKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DARRYL WRIGHT, Petitioner, v. JEANNE WOODFORD, Warden Respondent.	No. C-00-2519-PJH (PR) ORDER GRANTING CERTIFICATE OF APPEALABILITY

Petitioner Darryl Wright, a prisoner at San Quentin State Prison currently serving a sentence for first-degree murder, filed this action under 28 U.S.C. § 2254, alleging violation of his due process rights, ineffective assistance of counsel, and newly discovered evidence. On December 19, 2000, the petition was dismissed as untimely, under section 2254(d).

Petitioner now seeks a certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Fed. R. App. P. 22(b). A judge shall grant a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(3). The certificate must indicate which issues

satisfy this standard. Id.

Where a district court has rejected the constitutional claim on its merits, the showing required to satisfy section 2253(c) is straightforward: "the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 120 S.Ct. 1595, 1604 (2000). In this case, however, the dismissal was for a reason antecedent to the merits.

Section 2253(c)(1) also applies to an appeal of a final order entered on a procedural question antecedent to the merits. When the district court denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim, a certificate of appealability should issue "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Id.

Determining whether a certificate of appealability should issue when the petition was dismissed on procedural grounds involves two components, one directed at the underlying constitutional claims and the other directed at the district court's procedural holding. Id. Section 2253 requires that both showings be made before the court of appeals may entertain the record. Id. With regard to the "denial of a constitutional right" prong of the Slack test, where the district court has dismissed the petition on procedural grounds, the court simply takes a "quick look" at the face of the complaint, taking the factual allegations as true, and determines whether petitioner has facially alleged the denial of a constitutional right. Lambright v. Stewart, 220 F.2d 1022, 1026 (9th Cir. 2000). If the petitioner has facially alleged the denial of a constitutional right, and assuming that the procedural ruling is debatable, the certificate of appealability will issue.

The basis of the petition herein was petitioner's claim that newly discovered evidence placed him apart from the immediate vicinity of

the scene of the 1980 murder for which he was convicted in 1981. Specifically, he claimed that three witnesses could testify that he was inside a bar known as the "Fugitive Club" at the time that the murder victim was shot outside the bar, and that another witness could offer evidence supporting a claim of ineffective assistance of counsel. The court dismissed the petition on the basis that the factual claim could have been discovered through the exercise of due diligence before the running of the one-year statute of limitations mandated by the Antiterrorism and Effective Death Penalty Act of 1996, see 28 U.S.C. § 2244(d)(1)(D), which applies to cases, such as this one, filed after the Act's effective date of April 24, 1996.

Petitioner disputes the court's finding that the evidence could have been discovered through the exercise of due diligence before the running of the statute. Petitioner claims, with regard to at least two of the witnesses, that neither he nor his attorney could have known at the time of trial that those witnesses could have provided exculpatory evidence. The court found, however, based on the copies of court filings submitted by respondent, that petitioner had previously argued the issue of new witness testimony in state habeas petitions, and that petitioner had admitted that he had advised his attorney at the time of his trial that a number of people had seen him inside the Fugitive Club at the time of the shooting. Petitioner argues that a jurist of reason could find that "discovery of the factual predicate" of a claim involving new witnesses means identifying the witnesses and obtaining sworn statements from them, plus assurances that they would be available to testify at trial. He asserts that in this case, he and his trial counsel were unaware that at least two witnesses could provide exculpatory testimony.

For the reasons stated in this order, reasonable jurists would find it debatable whether the petition is time-barred. Moreover, petitioner has alleged the denial of his constitutional rights due to newly discovered evidence. Under Slack and Lambright, therefore, a certificate of appealability is GRANTED on the issue of whether the

petition is time-barred.

IT IS SO ORDERED.
Dated: January 29, 2001
PHYLLIS J. HAMILTON, United States District Judge

APPENDIX 4

FILED
D E C 19 2000
RICHARD W. WEIKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DARRYL WRIGHT, Petitioner, v. JEANNE WOODFORD, Warden Respondent.	No. C-00-2519 PJH (PR) ORDER GRANTING MOTION TO DISMISS

Petitioner Darryl Wright, a prisoner at San Quentin State Prison, filed this action under 28 U.S.C. § 2254, alleging violation of his due process rights, ineffective assistance of counsel, and newly discovered evidence. Respondent seeks an order dismissing the petition on the basis that it was untimely filed under the requirements of section 2254(d).

On July 2, 1981, a Contra Costa County jury convicted petitioner of first degree murder, enhanced for use of a firearm, for the November 1980 shooting death of Ernest Riley outside the Fugitive Club in Richmond, California. He was sentenced to 27 years to life. On January 11, 1984, the California Court of Appeal affirmed the judgment. The California Supreme Court denied review on March 14, 1984.

On June 18, 1997, more than 13 years later, petitioner filed a petition for a writ of habeas corpus in the Contra Costa Superior Court, alleging, among other things, a claim of newly discovered evidence in the form of testimony from witnesses who claim to have seen petitioner inside the Fugitive Club at about the time that petitioner is alleged to have shot Ernest Riley outside the club. The petition was denied on February 23, 1998, on the basis. that the evidence at issue-was cumulative and-that, in the case of one of the witnesses, that petitioner had had actual knowledge of the evidence at the time of his trial.

Petitioner filed a second petition in the California Court of Appeal on November 19, 1998. That petition was denied on November 25, 1,998, without comment. Petitioner filed a third petition in the California Supreme Court on December 10, 1998. That petition was denied on April 28, 1999, on the ground that it was untimely (citing *In re Robbins*, 18 Cal. 4th 770, 780 (1998)).

Petitioner filed this petition in the United States District Court on April 7, 2000. He contends that the trial court violated his right to due process by instructing the jury on consciousness of guilt, that newly discovered evidence demonstrates his innocence and mandates a new trial, and that both trial and appellate counsel rendered ineffective assistance.

Petitioner's case is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which applies to all cases filed after its effective date of April 24, 1996. See *Miles v. Prunty*, 187 F.3d 1104,1105 (9th Cir. 1999). Whereas prior law imposed few time constraints on the filing of federal habeas petitions, the AEDPA imposes a one-year statute of limitations. See 28 U.S.C. § 2244(d). Respondent argues that petitioner's claims are untimely under the one-year limitations period, and moves to dismiss the petition on that basis.

The AEDPA requires that a petition for a writ of habeas corpus by a state prisoner be filed within one year from "the date on which the judgment became final by the conclusion of direct review or the

expiration of the time for seeking review." 28 U.S.C. § 2244(d)(1)(A). Here, that date was ninety days after the California Supreme Court denied direct review of the judgment, or June 12, 1984. Because this date was prior to the enactment of the AEDPA, however, he had until one year after the effective date of the AEDPA to file his petition. See *Dictado v. Ducharme*, 189 F.3d 889, 891 (9th Cir. 1999).

The limitations period is tolled during the time during which a properly filed application for post-conviction or other collateral review is pending in state court See 28 U.S.C. 2244(d)(2). In this case, however; even assuming that petitioner's court petitioner's state court proceedings would have been sufficient to toll the AEDPA one year limitations period, the statute of limitations had already commenced and fully run by April 24, 1997, well before petitioner first sought collateral review in Contra Costa County Superior Court on June 18, 1997. His petition is accordingly barred under section 2244(d)(1)(A).

Petitioner makes two principal arguments in response to the motion to dismiss. First, he contends that a motion to dismiss is procedurally improper under either Federal Rule of Civil Procedure 12 or under the Rules Governing Section 2254 Cases, 28 foil. § 2254; that respondent should be required to first file an answer and a copy of relevant portions of the trial and appellate record; and that petitioner should be permitted to file a traverse, before the court entertains a motion to dismiss. Second, he asserts that the issue is whether he was diligent about locating witnesses and obtaining their statements, not whether the witnesses were actually known to him at the time of the trial or at any time up to the time that the statute of limitations began to run. He contends that this issue cannot be resolved in the absence of a factual record, and that development of such a record will require that the court conduct an evidentiary hearing. With regard to the question of the propriety of respondent's motion to dismiss, petitioner is correct that a Rule 12 motion is improper in habeas cases. See O'Bremski v. Maass, 915

F.2d 418, 420 (9th Cir. 1990), cert. denied, 498 U.S. 1096 (1991). However, Rule 4 of the section 2254 habeas rules authorizes the court to "order the respondent to file an answer or other pleading ... or to take such other action as the judge deems appropriate.' The Advisory Committee Notes explain that this provision in Rule 4 "is designed to afford the judge flexibility in a case where either [summary] dismissal or an order to answer may be inappropriate." Although [i]t has been suggested that an answer should be required in every habeas proceeding.... under § 2243 it is the duty of the court to screen out frivolous applications and eliminate the burden that would be placed on the respondent by ordering an unnecessary answer.... In [certain] situations, a dismissal may be called for on procedural grounds, which may avoid burdening the respondent with the necessity of filing an answer on the substantive merits of the petition.

It is true, as petitioner points out, that the Advisory Committee Notes speak in terms of the court's to make a motion to dismiss based on information "authoriz[ing] the respondent furnished by the respondent, " rather than in terms of respondent's moving to dismiss the petition in response se to an order to show cause. However, the court finds that the motion to dismiss filed in this case is appropriate and well within what is authorized by the habeas rules.

With regard to the question of whether the petition is time-barred, petitioner suggests that the limitation period established by the AEDPA does not apply in this case because the evidence is "newly discovered." Under the AEDPA, petitions by prisoners challenging non-capital state convictions or sentences must be filed within one year of "... (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. §2244(d)(1)(D). Petitioner, however, does not argue that he did not know of the factual predicate of his claim until June 19, 1996 (one year before he filed his petition for writ of habeas corpus in Contra Costa Superior

Court). Instead, he simply contends that the issue is "whether [he] was diligent" in discovering this "new evidence."

Based on the copies of court filings submitted by respondent, the court finds that plaintiff previously argued the issue of new witness testimony in his state habeas petitions.[3] Indeed, petitioner stated in a declaration filed in Contra Costa Superior Court hat he had advised his attorney at the time of trial that there were a number of people who -had seen him inside the Fugitive Club at about the time of the shooting. Thus, the factual of petitioner's claim could have been discovered through the exercise of diligence before June 1996.

Accordingly, the court finds that plaintiff has has not establish cause for extending the limitation period beyond that mandated by the AEDPA The motion to dismiss is GRANTED.

This order fully adjudicates the motion listed at No. 17 on the clerk's docket for this case.

IT IS SO ORDERED.

Dated: December 19, 2000

PHYLLIS J. HAMILTON, United States District Judge

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[3] Petitioner objects to the admissibility of respondent's exhibits on the basis that they are not certified or authenticated by court clerks, but rather are simply identified by the Deputy Attorney General as "true and correct" copies of criminal minutes, court opinions, and briefs and declarations filed by petitioner in connection with his three California habeas petitions. The court is satisfied, however, based on the representations of the Deputy Attorney General, that the documents are what they are represented to be. The only exhibits considered by the court, Exhibits 5 through 11, consist of copies of the three petitions for writ of habeas corpus, filed by petitioner in the Contra Costa Superior Court, the California Court of Appeal, and the California Supreme Court, along with copies of the orders denying the petitions issued by the respective courts. Petitioner does not contend that the file stamps are defective or unreliable, only that they are inadmissible because they do not bear lie tamps. Under the circumstances the court finds that Exhibits 5-11 are adequately authenticated for the purpose for which they were presented.